IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

VALERIA TANCO and SOPHY JESTY, et al., **Plaintiffs,** **vs.** **WILLIAM EDWARD "BILL" HASLAM, as Governor of the State of Tennessee, et al.,** **Defendants.**	Case No. 3:13-cv-01159 Judge Aleta A. Trauger Magistrate Judge Griffin **AMICUS BRIEF OF FAMILY ACTION COUNCIL OF TENNESSEE IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

***Cases*:**

***Constitutional Provisions*:**

***Other Authorities*:**

INTEREST OF AMICUS CURIAE

Amicus Curiae Family Action Council of Tennessee ("FACT") is a non-partisan, non-profit organization that exists to strengthen families in Tennessee through citizen advocacy and education. FACT focuses its efforts on public-policy issues involving marriage, children, the family, and constitutional government. FACT is a strong advocate for the traditional family, which is promoted and defended by Tennessee's Marriage Amendment. The amendment states:

> The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

Tennessee Constitution, Article 11, section 18.

This case questions the constitutionality of Tennessee's sovereign decision to preserve marriage as the union between one man and one woman. As a citizen-advocacy organization, FACT's interest in this case derives directly from the important public-policy issues implicated by the Marriage Amendment, and from the central role in governing the state fulfilled by Tennessee's electorate, which overwhelmingly enacted the Marriage Amendment into law on November 7, 2006.

STATEMENT OF THE FACTUAL AND LEGAL ISSUES

A persistent and increasingly popular claim by supporters of same-sex marriage is that the United States Supreme Court's decision in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), striking down Section 3 of the federal Defense of Marriage Act ("DOMA"), mandates that states like Tennessee recognize same-sex marriages entered into in other states. Nothing could be further from the truth. *Windsor* held only that the federal government may not decline to recognize, for

purposes of providing federal benefits, a same-sex marriage previously recognized by a sovereign state. *Windsor* does not forbid States like Tennessee from preserving marriage as the union of one man and one woman—to the contrary, the Court's repeated references to our federalist structure, and its repeated assurances that states retain plenary and sovereign power to define marriage within constitutional bounds, only serve to bolster the defense of Tennessee's Marriage Amendment. Similarly unavailing is Plaintiffs' implicit resort to the Full Faith and Credit Clause of the United States Constitution as support for the proposition that Tennessee must recognize, in contravention of its stated public policy, same-sex marriages entered into in foreign jurisdictions. Plaintiffs conveniently dub Tennessee's duly considered and constitutionally enacted marriage laws as mere "Anti-Recognition Laws," and argue that, because Tennessee has traditionally looked to the place of celebration of a marriage to determine its validity, it is therefore compelled to recognize same-sex marriages as valid. But Plaintiffs are mistaken, and confuse a traditional practice of comity with a constitutional imperative—indeed, Supreme Court jurisprudence on the Full Faith and Credit Clause, and the collective judgment of supporters and opponents of same-sex marriage alike on the question, confirm that Tennessee is free to define and recognize marriage as the union of one man and one woman, to the exclusion of all other arrangements.

Defendants have already amply demonstrated in their Response that same-sex marriage is not a fundamental right and that Tennessee's definition of marriage as the union of one man and one woman violates no principle of equal protection under the United States Constitution. Amicus Curiae establishes below that the longstanding principles of federalism enunciated in *Windsor*, and a proper interpretation of the Full Faith and Credit Clause, together fully support Tennessee's right to define marriage as the union of one man and one woman, and fully support

its right to recognize only those unions that comport with that definition. Accordingly, Amicus Curiae respectfully requests that this Court deny Plaintiffs' Motion for Preliminary Injunction.

ARGUMENT

I. THIS COURT SHOULD NOT CREATE "A FEDERAL INTRUSION ON STATE POWER" AND "DISRUPT THE FEDERAL BALANCE" BY READING INTO THE CONSTITUTION A MANDATE TO REDEFINE MARRIAGE.

The principles of federalism recently enunciated by the Supreme Court in *U.S. v. Windsor*, with respect to the propriety of a sovereign state defining for itself the precise boundaries of the marital relation, dictate that this Court should reject Plaintiffs' attempt to compel Tennessee to recognize marriages that conflict with its clearly established and constitutional public policy regarding same-sex marriage. Plaintiffs' *ipse dixit* that Tennessee's Marriage Amendment is "an affront to our nation's federalism," Pls.' Brief at 4, is unsupported by law or logic. In fact, Tennessee's sovereign decision to define marriage as exclusively the union between one man and one woman represents the quintessential exercise of a power properly belonging to the states.

The U.S. Supreme Court has explained that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Federalism rests on two conceptual pillars—the first is that the powers of the national government are "delegated," rather than inherent powers; the second is that the powers of the States are "reserved" powers. The federalist system is founded on the understanding that "the people are the source of authority [and] the consequence is, that they . . . can distribute one portion of power, to the more contracted circle, called state governments: they can also furnish another proportion to the government of the United States." *James Wilson Replies to Findley, Dec. 1, 1787, in* 1 Debates on the Constitution 820 (Bernard Bailyn ed., 1993). Thus, it is axiomatic that "the National Government possesses only limited powers [while] the States and

the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012). Indeed, over two centuries ago James Madison confirmed this truism, stating that "[t]he powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite." *The Federalist* No. 45, at 241 (George W. Carey & James McClellan eds., 2001); *see also United States v. Comstock*, 560 U.S. 126, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring) (holding that the "the powers reserved to the States consist of the whole, undefined residuum of power remaining after taking account of powers granted to the National Government").

For this Court to rule that the United States Constitution mandates that Tennessee redefine marriage or recognize those marriages that conflict with its clear public policy on the question would improperly federalize a question that is undoubtedly within the "residuum" of power reserved to the states. The Supreme Court has noted that "[o]ne of the principal areas in which [it] has customarily declined to intervene is the realm of domestic relations," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004), and to intervene in Tennessee's regulation of marriage would "thrust the Federal Judiciary into an area previously left to state courts and legislatures," *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73 n.4 (2009). It would also, absent any textual or precedential direction to do so, create "a federal intrusion on state power" and "disrupt[] the federal balance." *Windsor*, 133 S. Ct. at 2692.

The Supreme Court forcefully reiterated just last term in *Windsor* that "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Id*. at 2689-90. The Court further noted that "[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens," and affirmed that "[t]he definition of marriage is the foundation of the State's

broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Id*. at 2691.

And it has been so since the Republic's inception: "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Id*. at 2680-81 (quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-384 (1930)). Indeed, it is simply beyond cavil that "'the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.'" *Id*. at 2691 (quoting *Haddock* v. *Haddock*, 201 U.S. 562, 575 (1906)). This is why the "Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *Id*. This is also why the "incidents, benefits, and obligations of marriage . . . may vary . . . from one state to the next" without raising the specter of constitutional infirmity. *Id*. at 2692.

A state's definition of marriage must of course comport with "constitutional guarantees," but where, as here, it clearly does, a constitutional claim does not lie as a result of simple variance between states, no matter how disappointing the variance may prove to be in theory or practice.[1] Put simply, there is no reason for this Court to depart from the longstanding and constitutionally proper exercise of state authority over the marital relation. There is no

[1] The "constitutional guarantees" referenced by the Court are not applicable here because all of the cases that have constrained a state's regulation of marriage have involved laws that prevented individuals otherwise qualified for marriage from marrying, and have not gone to the essentials of what marriage is, as the claim in this case does. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

jurisprudential warrant in our federalist system for the federal courts to superintend the domestic relations laws of the states, and myriad prudential considerations implicated by federalism only serve to further confirm this conclusion.

II. PROTECTING FEDERALISM IS A COMPELLING INTEREST THAT JUSTIFIES NON-INTERFERENCE BY THE FEDERAL COURTS WITH THE STATE'S SOVEREIGN AUTHORITY TO REGULATE MARRIAGES.

Our federal system is premised on the "counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). As Justice Kennedy has noted, "[t]he Framers split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), and "concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond*, 131 S. Ct. at 2364.

Federalism "'preserves the integrity, dignity and residual sovereignty of the States,'" and "secures to citizens the liberties that derive from the diffusion of sovereign power." *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013). This is important because "[w]ithout some degree of sovereign status, states would not have the capacity to act as a 'counterpoise' to federal power." Robert F. Nagel, *The Implosion of American Federalism* 32 (2001). That is why the federal structure "recognizes and preserves the autonomy and independence of the states." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 75 (1938). As the Court has explained:

> Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution *specifically authorized or delegated* to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state and, to that extent, a denial of its independence.

Id. at 79 (quoting *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)) (emphasis added).

This diffusion of powers ensures that citizens may control their own destiny and that different states may adopt different policies uniquely suited to the desires and aspirations of the people of those states. The Supreme Court recently explained the merits of the federalist system:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory, 501 U.S. at 458.

A. Federalism Promotes the Self-Determination of the Citizens of the States.

This interest in "increase[d] opportunity for citizen involvement in democratic processes" is particularly important in a case such as this, in which Plaintiffs contend that the Court must second-guess a sovereign decision by the People of Tennessee, one arrived at in their direct, representative capacity. With respect to this capacity and its exercise, Justice Black once stated that "the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights." *In re Winship*, 397 U.S. 358, 385 (1970) (Black, J., dissenting). Justice Kennedy has expounded upon the federalist system by explaining that the "theory that two governments accord more liberty than one requires for its realization two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). And when those lines blur or are obliterated altogether, as Plaintiffs seem to suggest is proper in this case, danger lurks. Justice Kennedy diagnosed the problem in this way:

> Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

Id. at 577 (citations omitted).

The Supreme Court's recent decision in *Windsor* reaffirms the essential value of political self-determination by striking down Section 3 of the federal Defense of Marriage Act, which the Court characterized as "depart[ing] from th[e] history and tradition of reliance on state law to define marriage." *Windsor*, 133 S. Ct. at 2692. In *Windsor* the Court spoke of the New York legislature's decision in terms that stressed the importance of citizen involvement, noting that "[a]fter a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage." *Id*. at 2689. The Court further stated that New York's sovereign decision regarding marriage "reflects . . . the community's considered perspective," *id*. at 2692-93, one that "respond[ed] 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.'" *Id*. at 2692 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2359 (2011)). The majority could not have been clearer in affirming the inviolability of state independence in defining the marital relation when it unhesitatingly stated that the "dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other." *Id*. Clearly then, Tennessee's decision reflecting the consensus of its citizens about a matter as fundamental as the definition of marriage—the foundation of the family and the most basic unit of society—ought to be entitled to the highest degree of respect by this Court.

B. Federalism Promotes Interstate Pluralism with Its Associated Benefits.

Beyond the importance of safeguarding local self-government, federalism also advances interstate pluralism. "Interstate pluralism is the feature of our federal system that reflects the ability of each state to establish itself as a distinct community. It entails the ability to make and enforce choices on foundational matters such as fundamental ordering of . . . family relations" and "seeks to protect each state's ability to create and enforce these fundamental orderings and thereby define its society." Jeffrey L. Rensberger, *Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate*, 2008 BYU L. Rev. 1703, 1722-23.

Interstate pluralism allows states to experiment with various social and legal policies free from interference and to reflect the unique preference and attributes of the state. As the U.S. Supreme Court has "long recognized," the States have an important role "as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). In this vein Justice Brandeis famously argued that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And Justice Kennedy has expounded upon this, noting that "the theory and utility of our federalism are revealed [when] States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581.

It is common in many areas of the law for particular states to be viewed favorably by residents of other states because of the state's approach to a variety of legal issues, such as taxation and business regulations, as well as domestic relations. Since "interstate pluralism allows for state-to-state differentiation, it encourages individuals to relocate to take advantage of a particular social policy, be it low taxes, high employment, a high level of social services, or

personal safety." Rensberger, *Interstate Pluralism*, *supra*, at 1739. And the Supreme Court has said it "should not diminish that [experimentation] role absent impelling reason to do so," *Oregon*, 555 U.S. at 171, for the Court is "not empowered by the Constitution to oversee or harness state procedural experimentation" and may intervene "only when the state action infringes fundamental guarantees," *Chandler v. Florida*, 449 U.S. 560, 582 (1981).

Additionally, "federalism protects minority rights—the rights of communities or whole regions to maintain their customs, their diversity and individuality, their self-rule." James McLellan, *Liberty, Order, and Justice* 316 (3d ed. 2000). Federalism protects the "different preferences and needs" of different States. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Cal. L. Rev. 485, 510 (2002). And this is more than appropriate, considering the fact that "in culture, conditions, and social values, the states are fundamentally different from one another." Rensberger, *supra*, at 1792. In sum, there is no reason these often pervasive but constitutionally permitted differences may not be reflected in state laws, especially with regard to an issue so central to the individual states as marriage.[2]

III. PLAINTIFFS' IMPLICIT RESORT TO THE FULL FAITH AND CREDIT CLAUSE AS SUPPORT FOR THE PROPOSITION THAT TENNESSEE MUST RECOGNIZE SAME-SEX MARRIAGE IS UNAVAILING.

The Full Faith and Credit Clause ("Clause"), as consistently interpreted by the United States Supreme Court, unquestionably permits Tennessee to decline to recognize marriages

[2] The Supreme Court's involvement with respect to obscenity regulations is instructive here. "[T]he Court explicitly allowed for diversity within the United States of what is obscene," Rensberger, *supra*, at 1732, concluding that "our Nation is simply too big and too diverse for this Court to reasonably expect that such [obscenity] standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists," *Miller v. California*, 413 U.S. 15, 30 (1973). The Court tellingly refused to permit such "diversity . . . to be strangled by the absolutism of imposed uniformity." *Id*. at 33. Obviously, strangling the diversity of state marriage policies with a uniformity imposed by the federal courts is an even more substantial threat to the values advanced by federalism than the one faced by the Court in *Miller*.

offensive to its constitutionally-established public policy, a policy reflected and clearly elucidated in its Marriage Amendment. The Clause provides that

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. Although they do not state the matter in such explicit terms, Plaintiffs appear to be arguing that Tennessee's general practice of accepting foreign marriages as valid if they were valid in the place of their celebration somehow turns a voluntary practice of comity into a constitutional imperative. But consistent Supreme Court jurisprudence on the Clause will not support such a strained interpretation. As noted previously, our federalist structure permits Tennessee to exercise plenary power in defining marriage, and the Full Faith and Credit Clause confirms its right to decline to recognize those marriages offensive to its public policy.

A. The Full Faith and Credit Clause Requires Only that States Give Conclusive Effect to the Judgments of Other States.

The Supreme Court early on in its history decided that state *judgments* were to be given *res judicata* effect in all sister states. *See Mills v. Duryee*, 11 U.S. 481, 485 (1813) ("It is manifest however that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision."). In effect the Court established that the Clause (or more precisely its implementing statute) was a substantive, self-executing command as to *judgments*. But conspicuously absent from this decision was any corresponding dictate that acts, or laws, were to receive similar treatment. It is clear that the Supreme Court has consistently held that while states must recognize proper judgments from other states as valid and final, they need not do so for "public Acts."

Indeed, the Court long ago recognized and established the crucial distinction between judgments and acts, or statutes, with respect to the application of the Clause. In *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532, 547 (1935), the Court noted that "a rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." In *Pacific Employers Insurance Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 501 (1939), the Court reaffirmed that while the purpose of the Clause

> was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.

Thus statutes, as opposed to judgments, receive radically different treatment under the Clause, and myriad cases, decided by the Court up to the present day, establish and confirm this truism.[3]

[3] *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (holding that the Clause was not violated by the application of Minnesota law to permit "stacking" in an insurance action brought pursuant to a motorcycle accident culminating in a fatality, even though the insurance policy in question was issued in Wisconsin, the accident in question occurred in Wisconsin, and all parties were Wisconsin residents at the time of the accident, and determining that a state could constitutionally apply its own law so long as it had "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair"); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (affirming that the application by a Kansas Court of its own statute of limitations to claims arising under the substantive law of other jurisdictions did not violate the Clause, and permitting a state to select its own law over the law of another state, irrespective of the *Allstate* test, by applying a traditional choice of law rule that was extant at the time the Clause was ratified); *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (affirming the decision of a Missouri district court to permit the testimony of an expert, despite the existence of a Michigan injunction forbidding such testimony, out of concerns that enforcing the injunction would permit Michigan to interfere in the litigation by dictating to Missouri precisely *how to enforce* the judgment, and expressly distinguishing between "the credit owed to laws (legislative measures and common

Put simply, given the Supreme Court's jurisprudence on the Clause in general, it can hardly be maintained that defining and recognizing marriage is not a state interest sufficient to apply Tennessee law to Plaintiffs' suit in the instant matter.[4] Thus there simply is no warrant to compel the relief Plaintiffs seek here, because marriage is an act subject to Tennessee's sovereign power.

B. Marriage is an Act and Not a Judgment.

Although proponents of same-sex marriage often contend that marriage is something other than an act, they are mistaken. The reason marriage must be considered an act for purposes of applying the Clause is perhaps best and most succinctly described by conflict of laws scholar Ralph U. Whitten:

---

law) and to judgments"); *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 495-96 (2003) (affirming the application of Nevada law to a tort action brought in Nevada by a Nevada resident, against a California tax collection agency, and reiterating the axiomatic principle that the Clause does not compel states to "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate" (quoting *Pac. Emp'rs. Ins. Co.* 306 U.S. at 501)).

[4] *See* Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 Creighton L. Rev. 147, 170-71 (1998) (arguing that even where a couple marries in a state that permits same-sex marriage and resides there for several years, "the later-acquired domicile is clearly a sufficient connection for the forum state to make determinations as to their marital status, just as Mrs. Hague's later move to Minnesota helped establish that state's right to determine her rights under the insurance policies. From a full-faith-and-credit perspective, it is hard to distinguish this hypothetical case from the holder of a Virginia gun license who moves to Washington, D.C. and wants to keep his guns in violation of a local ordinance. Presumably no one would deny that Washington, D.C. had acquired the authority to determine whether he could keep guns, no matter what his rights might formerly have been in Virginia."); Ralph U. Whitten, *Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 Creighton L. Rev. 255, 257-58, n.14 (1998) ("In the marriage context, it would certainly be constitutional for a state to apply its law to its own same-sex domicillaries who flew to Hawaii to evade the marriage restrictions of their own state. But even if the same-sex partners are domiciled in Hawaii when they are married and later move to another state, the establishment of domicile in the new state would also give the state sufficient contacts to justify the application of its marriage restrictions to the couple. Even transitory presence in the state would give the state sufficient contacts to regulate the partners' conduct in the state.").

> In a nutshell, marriage involves an issue of full faith and credit to the public acts of other states. Marriage is sanctioned and regulated by statute in every state. The regulation of marriage by the states includes limitations on who can marry whom, including age limits, the degree of consanguinity within which marriages are permitted, residency requirements for marriage, and, of course, the permissible gender of parties to marriages. Even in situations in which, as in Massachusetts, the state's highest court invalidates a statutory restriction on state constitutional grounds, the issue remains one of full faith and credit to the public act regulating marriage with the constitutionally offensive restriction now eliminated.

Whitten, *Full Faith & Credit for Dummies*, 38 Creighton L. Rev. 465, 476 (2005).

The alternative argument that marriage is somehow a judgment cannot withstand scrutiny. Marriage is marked by none of the constitutive elements of a judgment—indeed, marriage is a consensual union totally lacking in any adversarial or adjudicative admixture, and thus it is not due the "exacting" regard judgments enjoy under the Full Faith and Credit Clause.[5] In a similar way, it cannot be that the marriage license itself is a "record" that is constitutionally due full faith and credit, for "a license . . . is simply evidence of some right or privilege granted by the laws of a state." Whitten, *Dummies*, *supra* at 477. The Clause does not give to licenses a sort of national imprimatur, such that states are powerless to regulate what is properly within their power—indeed, if we were to accept such a proposition then every state would then have to

[5] *See* Borchers, *supra*, at 167 ("To treat a marriage . . . as a 'judgment' would make nonsense out of a great deal of existing full-faith-and-credit doctrine. If a marriage license is a 'judgment,' then every one of the hundreds of decisions that have refused to recognize out-of-state marriages has been an undetected violation of the Clause. To carry the matter further, if a marriage license is a 'judgment,' then so must be fishing and hunting licenses. If one takes the expansive argument seriously, then a Wyoming game warden who refuses to allow the holder of a Colorado hunting license to hunt in Wyoming is denying the hunter his rights under the Full Faith and Credit Clause—a contention that cannot be seriously maintained."); Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 Creighton L. Rev. 409, 421 (1998) ("A marriage is not a judgment for full faith and credit purposes . . . but (truly) a 'ministerial' act. Despite a great deal of nonsense that has been written to the contrary, all of the hallmarks of a judicial proceeding are missing. There is neither adversariness nor a neutral decisionmaker with the power to grant or deny relief. Indeed, there is no decisionmaker empowered to decide what law to apply, a factor which the Supreme Court has relied upon to deny full faith and credit in another context.").

give every other state's licenses not only the nod as to their evidentiary sufficiency (i.e., agreeing that they exist and purport to be what they are), but also as to their effect, in that each license would trigger the same rights and privileges in one state as another.

A moment's reflection reveals this to be an absurd proposition. No one can seriously argue, for instance, that one state *must* accord all the same rights and benefits to a concealed weapons permit holder from another state that it does to one of its own residents.[6] Voluntary reciprocal arrangements aside, there is simply no constitutional command for such an expectation in this context or any other—the Clause does not compel one state to treat licenses from another state in the same manner it does its own licenses.[7] Thus the Clause cannot be enlisted to compel Tennessee to recognize foreign same-sex marriages. Despite the superficial appeal of the Clause, supporters, opponents, and neutral observers alike agree with this rather unremarkable proposition.[8] Ultimately, therefore, Plaintiffs' reliance on the place of celebration

---

[6] The list can be expanded almost at will—no state, for instance, is required by the Clause to automatically recognize and give full effect to medical, legal, nursing, hunting, fishing, and contractor licenses from another state, just to name a few. To argue differently can only be seen as special pleading of the most myopic sort.

[7] Lea Brilmayer, *Full Faith and Credit*, Wall Street Journal, March 9, 2004, at A16 ("The granting of a marriage license has always been treated differently than a court award, which is indeed entitled to full interstate recognition. Court judgments are entitled to full faith and credit but historically very little interstate recognition has been given to licenses.").

[8] *See, e.g.*, Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 Mich. L. Rev. 1421, 1434 (2012) ("The place of celebration rule is a voluntary rule of comity, not a matter of constitutional full faith and credit"); Hillel Y. Levin, *Resolving Interstate Conflicts over Same-Sex Non-Marriage*, 63 Fla. L. Rev. 47, 62 (2011) ("Descriptively, it has never been held that states must recognize other states' marriages in all circumstances under the Full Faith and Credit Clause. Although states do generally recognize marriages from sister states, they have always reserved for themselves the right to reject those marriages that violate their own public policies."); Lynn D. Wardle, *Who Decides? The Federal Architecture of Doma and Comparative Marriage Recognition*, 41 Cal. W. Int'l L.J. 143, 152-53 (2010) ("The overwhelming consensus of conflicts scholars (and historically the correct position) is that under long-established and unambiguous principles of both choice of law and full faith and credit, a state may constitutionally refuse to recognize same-sex marriages that are valid in other states if such unions violate the strong public policy of the forum."); Mark D. Rosen, *Why the Defense of*

"rule" is to no avail here—Tennessee is constitutionally permitted to decline to recognize foreign same-sex marriages, and the Clause simply has no impact on that sovereign decision, other than to perhaps confirm by default its constitutional propriety. [9]

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that this Court deny Plaintiffs' Motion for Preliminary Injunction.

Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires, 90 Minn. L. Rev. 915, 933 (2006) ("[A]lthough states typically give effect to marriages that were valid where the marriage occurred, nearly everyone agrees that this so-called 'place of celebration rule' is a state common-law rule rather than a constitutional mandate. Unlike a constitutional mandate, state law can override a common-law rule—for example, under a public-policy exception, a sister state's law need not be applied if doing so would violate a strong public policy of the forum."); Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 Am. J. Comp. L. 257, 272, 279 (2006) ("Thus, it seems clear that the Full Faith and Credit Clause does not mandate deference to another state's law, as a matter of choice of law, with respect to same-sex domestic relationships. . . . Current case law under the Full Faith and Credit Clause permits states to have their own laws and policies and to refuse deference to other states' laws."); Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. Davis L. Rev. 313, 325-26 (2006) ("[T]here is not the slightest doubt that under the Supreme Court's interpretation of the Full Faith and Credit Clause, a state has no obligation to look to another state's law to decide the validity of an out-of-state marriage contracted by its residents."); Richard S. Myers, *The Public Policy Doctrine and Interjurisdictional Recognition of Civil Unions and Domestic Partnerships*, 3 Ave Maria L. Rev. 531, 547-48 (2005) ("Basic conflicts doctrine permits a state to . . . [refuse to recognize a same-sex relationship (of whatever type)] . . . and the Constitution does not preclude a state from so choosing."); Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 Quinnipiac L. Rev. 191 (1996) ("[A] proper understanding of the role of choice of law and 'full faith and credit' reveals that states were never under compulsion to recognize out-of-state same-sex marriages . . . States are . . . free to apply their own laws to invalidate same-sex marriages performed in [other states] if they choose to do so").

[9] *See* Borchers, *supra*, at 185 ("[T]he Full Faith and Credit Clause cannot be legitimately involved to remove the debate from the political arena. Although both the proponents and opponents of same-sex marriage have apparently assumed that the Clause has a large role in this question, it legitimately has almost none. Like a large number of other issues of contemporary concern, same-sex marriage will have to be decided state by state.").

Respectfully submitted this the 9th day of December, 2013.

By: s/ Jonathan A. Scruggs

Jonathan A. Scruggs, TN Bar No. 25679
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
jscruggs@alliancedefendingfreedom.org

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to the following:

Attorneys for Plaintiffs:

Abby R. Rubenfeld # 6645
Rubenfeld Law Office, PC
2409 Hillsboro Road, Suite 200
Nashville, TN 37212
arubenfeld@rubenfeldlaw.com

Maureen T. Holland # 15202
Holland And Associates, PLLC
1429 Madison Avenue
Memphis, TN 38104-6314
mtholland@aol.com

William L. Harbison # 7012
Phillip F. Cramer # 20697
J. Scott Hickman # 17407
John L. Farringer IV # 22783
Sherrard & Roe, PLC
150 3rd Avenue South, Suite 1100
Nashville, TN 37201
bharbison@sherrardrod.com
pcramer@sherrardroe.com
shickman@sherrardroe.com
jfarringer@sherrardroe.com

Regina M. Lambert # 21567
7010 Stone Mill Drive
Knoxville, TN 37919
lambertregina@yahoo.com

Shannon P. Minter
Christopher F. Stoll
Asaf Orr
National Center For Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
sminter@nclrights.org
cstoll@nclrights.org
aorr@nclrights.org

Attorneys for Defendants:

Martha A. Campbell #14022
Deputy Attorney General
General Civil Division
Cordell Hull Building, Second Floor
P. O. Box 20207
Nashville, TN 37214
martha.campbell@ag.tn.gov

Kevin G. Steiling #10631
Deputy Attorney General
Civil Litigation and State Services Division
Cordell Hull Building, Second Floor
P. O. Box 20207
Nashville, TN 37214
kevin.steiling@ag.tn.gov

s/ Jonathan A. Scruggs
Jonathan A. Scruggs, TN Bar No. 25679